

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN THE MATTER OF:)	Application for Ex Parte Administrative
)	Warrant for Entry Inspection, Investigation
Sandoval Zinc Company Site)	and Sampling pursuant to Section 104(e)
Smelter Road Highway 51,)	of the Comprehensive Environmental
Marion County,)	Response, Compensation, and
Sandoval, Illinois)	Liability Act, 42 U.S.C. § 9604(e)
)	
)	Civil Docket No. 3:12-mc-00035-WDS

MEMORANDUM IN SUPPORT OF THE UNITED STATES'
APPLICATION FOR EX PARTE ADMINISTRATIVE WARRANT

The United States Environmental Protection Agency (EPA), Region 5, by and through the United States Attorney for the Southern District of Illinois, hereby applies for an ex parte warrant to allow its authorized representatives, including contract employees authorized by the EPA to assist in the execution of this warrant, as well as authorized representatives of the Illinois Environmental Protection Agency (IEPA), to enter, inspect, investigate, photograph, and take samples, at and from the property and facility owned by Mr. Russell R. Rhodes located east of the Village of Sandoval, Marion County, Illinois. The Site consists of 14.16 acres. The reasons supporting this request follow.

I. Statutory Background

The United States Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (“CERCLA”), 42 U.S.C. §§ 9601-9675, in response to widespread concern over the severe environmental and public health effects arising from the improper disposal of hazardous wastes and other hazardous substances. *See generally Eagle Picher Industries v. EPA*, 759 F. 2d 922, 925-26 (D.C. Cir. 1985). CERCLA provides the EPA,

through delegations of authority,¹ broad powers to investigate and clean up hazardous waste sites.

Section 104(a)(1) of CERCLA, 42 U.S.C. § 9604(a)(1), provides in relevant part as follows:

Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment . . . [EPA] is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance . . . at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan which [EPA] deems necessary to protect the public health or welfare or the environment.

Section 104(b)(1) of CERCLA, 42 U.S.C. § 9604(b)(1), provides in relevant part as follows:

Whenever [EPA] is authorized to act pursuant to subsection (a) of this section, or whenever [EPA] has reason to believe that a release has occurred . . . , [EPA] may undertake such investigation, monitoring, surveys, testing, and other information gathering as [EPA] deems necessary or appropriate to identify the existence and extent of the release or threat of thereof, the source and nature of the hazardous substances, pollutants or contaminants involved, and the extent of danger to the public health or welfare or the environment.

The requested inspection and investigation of this Site is authorized by section 104(e) of the CERCLA, 42 U.S.C. § 9604(e), which provides in pertinent part:

(e) Information gathering and access

(1) Action authorized

Any officer, employee, or representative of the President, duly designated by the President, is authorized to take action under paragraph (2), (3), or (4) (or any combination thereof) at a vessel, facility, establishment, place, property, or location or, in the case of paragraph (3) or (4), at any vessel, facility, establishment, place, property, or location which is adjacent to the vessel, facility, establishment, place, property, or location referred to in such paragraph (3) or (4). The authority of paragraphs (3) or (4) may be exercised only if there is a reasonable basis to believe there may be a release or threat of release of a hazardous substance or pollutant or contaminant. The authority of this subsection may be exercised only for the purposes of determining the need for response, or choosing or taking any response

¹ The President of the United States has delegated most of the authority for administering CERCLA to the Administrator of EPA. See Exec. Order No. 12,418, 48 *Fed. Reg.* 20,891 (May 5, 1983); Exec. Order No. 12,580, 52 *Fed. Reg.* 2,923 (January 29, 1987).

action under this subchapter, or otherwise enforcing the provisions of this subchapter.

* * *

(3) Entry

Any officer, employee, or representative described in paragraph (1) is authorized to enter at reasonable times any of the following:

(A) Any vessel, facility, establishment, or other place or property where any hazardous substance or pollutant or contaminant may be or has been generated, stored, treated, disposed of, or transported from.

(B) Any vessel, facility, establishment, or other place or property from which or to which a hazardous substance or pollutant or contaminant has been or may have been released.

(C) Any vessel, facility, establishment, or other place or property where such release is or may be threatened.

(D) Any vessel, facility, establishment, or other place or property where entry is needed to determine the need for response or the appropriate response or to effectuate a response action under this subchapter.

(4) Inspection and samples

(A) Authority

Any officer, employee or representative described in paragraph (1) is authorized to inspect and obtain samples from any vessel, facility, establishment, or other place or property referred to in paragraph (3) or from any location of any suspected hazardous substance or pollutant or contaminant. Any such officer, employee, or representative is authorized to inspect and obtain samples of any containers or labeling for suspected hazardous substances or pollutants or contaminants. Each such inspection shall be completed with reasonable promptness.

(B) Samples

If the officer, employee, or representative obtains any samples, before leaving the premises he shall give to the owner, operator, tenant, or other person in charge of the place from which the samples were obtained a receipt describing the sample obtained and, if requested, a portion of each such sample. A copy of the results of any analysis made of such samples shall be furnished promptly to the owner, operator, tenant, or other person in charge, if such person can be located.

* * *

(6) Other authority

Nothing in this subsection shall preclude the President from securing access or obtaining information in any other lawful manner.

Consistent with with Section 104(e)(6) of CERCLA, the President, by and through delegations to the Superfund Division Director of the EPA, Region 5, and the United States Attorney for the Southern District of Illinois, seek an ex parte warrant from this Court authorizing the EPA, IEPA, and their representatives, agents, and contractors to enter, inspect, investigate and as needed take samples on the Site.

II. Background

The Sandoval Zinc Company Site is located east of the Village of Sandoval, approximately 1,440 feet (0.27 miles) east of U.S. Route 51 and 2240 feet (0.42 miles) south of U.S. Route 50 at the eastern end of Smelter Road (a.k.a. Mississippi Avenue) (“Site”). See Attachment 1- Expanded Site Inspection, p. 5. The Site consists of 14.16 acres of property located in the southern portion of Marion County, Illinois. *Id.* at pages 5-6. The Site smelter facility began operations as a primary zinc smelter between 1885 and 1890. *Id.* at p. 8. In approximately 1915, the operations were converted to secondary zinc smelting. *Id.* Compounds fed into the kilns were pure zinc, zinc oxide, zinc chloride, aluminum chloride and other trace metals. *Id.* The facility remained a secondary smelter until the facility closed in 1985. *Id.* In December 1986, the Sandoval Zinc Company was officially dissolved and the owners declared bankruptcy. *Id.*

During the first eighty-five years of operation, the principal waste emissions from the plant were metal laden cinder/slag and windblown ash. *Id.* at p. 9. Large quantities of cinder/slag from the smelting process were used in constructing and surfacing secondary roads in the plant and as fill

material on the property. *Id.* Sampling conducted on the Site in October 2009 as part of the Expanded Site Inspection found elevated levels of antimony, arsenic, barium, cadmium, chromium, copper, iron, lead, mercury, nickel, selenium, silver, sodium, and zinc. *Id.*

Based on the results of the Expanded Site Inspection, the Site was scored for possible inclusion on the National Priorities List (NPL). See Attachment 2-HRS Scoring Package. The NPL is a list of properties with known or threatened releases of hazardous substances, pollutants, or contaminants throughout the United States. The list is required under section 105(a)(8)(B) of CERCLA, as amended. Section 105(a)(8)(B) defines the NPL as a list of "releases" and the highest priority "facilities" and requires that the NPL be revised at least annually. The NPL is intended to guide EPA in determining which sites warrant further investigation to assess the nature and extent of public health and environmental risks associated with a release of hazardous substances, pollutants or contaminants. On March 10, 2011, the Site was proposed in the Federal Register for listing on the NPL. See Attachment 3. After a public comment period, the Site was listed as included on the NPL on September 16, 2011. See Attachment 4.

After placing the Site on the NPL, EPA attempted to obtain access from the owner of the Site so it could conduct a remedial investigation and feasibility study (RI/FS). See Attachment 5-Declaration of Pamela Molitor (Molitor Declaration) at ¶14. EPA regulations provide that the Remedial Investigation is a process undertaken to determine the nature and extent of contamination at a site. (40 CFR 300.5). A Feasibility Study is a study undertaken to develop and evaluate options for remedial actions. (40 CFR 300.5).

On September 20, 2011, the Remedial Project Manager for the Site, Pamela Molitor, sent out two letters to the then owner on file, Mr. Scott Farmer. *Id.* and Attachment 6- September 20, 2011 letters. One letter went out regular mail and the other letter was sent by certified mail. Molitor

Declaration at ¶14. Each letter asked the recipient to sign an enclosed access agreement and to contact EPA with any questions. *Id.* Both letters were returned with the stamp “vacant, no forwarding address.” *Id.* and Attachment 7- Returned September 20, 2011 letters. Ms. Molitor then contacted the Marion County clerk and recorder’s office on October 13, 2011 to find out if there was another address for Mr. Farmer and/or if another person was listed as an owner for the Site. Molitor Declaration at ¶15. She was informed that a quit claim deed conveying the property to Mr. Russell R. Rhodes of Metropolis, Illinois, had been signed by Mr. Farmer in 2010. *Id.* The only contact information for Mr. Rhodes was Metropolis, Illinois 62960. *Id.* Additionally, the clerk told Ms. Molitor that the taxes had not been paid on the Site since 2007. *Id.*

A search of the yellow pages located three addresses for a Mr. Russell Rhodes in Metropolis, Illinois. Molitor Declaration at ¶16. A letter was sent to all three addresses on October 27, 2011. *Id.* and Attachment 8- October 27, 2011 letter. Each letter asked the recipient to sign an enclosed access agreement and to contact EPA with any questions. Molitor Declaration at ¶16. On November 15, 2011, two of the letters were returned as undeliverable. *Id.* and Attachment 9- Returned October 27, 2011 letter. The third was delivered and signed for on November 3, 2011. Molitor Declaration at ¶16 and Attachment 10- Green card for October 27, 2011 letter. However, EPA has received no response to its October 27, 2011 letter requesting access. Molitor Declaration at ¶16.

Access is sought so that EPA can undertake a RI/FS at the Site. This would consist of:

Site set up – which includes construction of a staging area and set up of a field laboratory.

Site reconnaissance – which includes conducting site surveys including property boundary, well inventory, utility rights-of-way, and topographic information.

Geological investigations of surface and subsurface soil.- which includes surveying, visual inspection and sampling at varying depths in the soils.

Hydrogeological investigations of ground water and surface water - which includes installation and development of wells, and execution of pump tests and groundwater/surface water elevation measurements.

Ecological investigations of wetland and habitat delineation/ function and value assessment- which includes wildlife observations, benthic community characterization, identification of endangered species and bioassays.

Molitor Declaration at ¶13.

III. Argument

A federal agency is authorized to apply for and obtain an administrative warrant if Congress has granted the agency statutory inspection authority. *United States v. M/V Sanctuary*, 540 F.3d 295, 300 (4th Cir. 2008) (upholding issuance of warrant to the EPA under the Toxic Substances Control Act) (citing *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 325 (1978)); *Nat'l-Std. Co. v. Adamkus*, 881 F.2d 352, 363 (7th Cir. 1989) (upholding issuance of warrant to the EPA under the Resource Conservation and Recovery Act); *Mobil Oil Corp. v. U.S. EPA*, 716 F.2d 1187, 1191 (7th Cir. 1983) (upholding issuance of warrant to the EPA under the Clean Water Act); *In re Yoder's Slaughterhouse Site*, 519 F. Supp. 2d 574, 579 (D. Md. 2007) (upholding issuance of warrant to the EPA under CERCLA). Such administrative warrants may be obtained on an *ex parte* basis. *Bunker Hill Co. Lead & Zinc Smelter v. U.S. EPA*, 658 F.2d 1280, 1285 (9th Cir. 1981).

EPA's statutory authority to enter, inspect, obtain samples, and perform investigative activities is clear. *See* 42 U.S.C. § 9604(a), (b) and (e). In the present case, EPA seeks a warrant to allow the Agency or its authorized representatives to implement and enforce the provisions of CERCLA, i.e.,

to perform response actions (inspections, investigation and sampling) in response to a release or threat of release of hazardous substances into the environment from the Site. The standards for performing such response actions are contained within the NCP, 40 C.F.R. Part 300. It is well established that a court may issue an administrative inspection warrant without the necessity of finding that there is “probable cause” to believe that conditions in violation of EPA standards exist on the premises. In *Barlow’s*, the Supreme Court explained that:

Whether the Secretary proceeds to secure a warrant or other process, with or without prior notice, his entitlement to inspect will not depend on his demonstrating probable cause to believe that conditions in violation of OSHA exist on the premises. Probable cause in the criminal sense is not required. For purposes of an administrative search such as this, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that “reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular establishment.” (Citation and footnote omitted.) *Id.* at 320.

Under section 104(e) of the CERCLA, the standard for determining if a court shall issue an administrative warrant for access and entry is whether “there is a reasonable basis to believe there may be a release or threat of release of a hazardous substance or pollutant or contaminant”. 42 U.S.C. § 9604(e)(5)(B); *see, e.g., United States v. Tarkowski*, 248 F.3d 596, 599 (7th Cir. 2001); *United States v. Fisher*, 864 F.2d 434, 438 (7th Cir. 1988); *United States v. Mountaineering Ref. Co.*, 886 F. Supp. 824, 828 (D. Wyo. 1995). This standard is sufficient to ensure that “[t]he decision to enter and inspect [is not] the product of the unreviewed discretion of the enforcement officer in the field”. *See v. City of Seattle*, 387 U.S. 541, 545 (1967).

The standard for EPA to obtain a warrant under CERCLA section 104(e) is not difficult to meet. *Tarkowski*, 248 F.3d at 599 (“[t]he requirement for reasonable basis is easily satisfied”), *Fisher*, 864 F.2d at 438 (the standard is “undemanding”). EPA need only show that its “demand for access, grounded in ‘a reasonable basis to believe there may be a release or threat of release of a hazardous

substance,’ is not ‘arbitrary and capricious, an abuse of discretion,’ or otherwise illegal.” *Fisher*, 864 F.2d at 438. CERCLA directs courts to require compliance with the EPA’s request for access unless the court finds that the request is “arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law.” 42 U.S.C. § 9604(e)(5)(B). Furthermore, EPA need not prove that any minimum amount of hazardous substances have been, or are threatened to be, released. *Mountaineering Ref. Co.*, 886 F. Supp. at 828. *See also Tarkowski*, 248 F.3d at 599 (“there is nothing in section 104(e)(1) about magnitude”).

Access is needed to the Site to conduct a RI/FS. Molitor Declaration at ¶ 14. This activity is necessary to determine the nature and extent of contamination at the Site, the risks to human health and the environment and what action is needed to remediate any such risks. Molitor Decl. ¶ 9. While the Site appears to have been abandoned and the EPA does not anticipate the RI/FS will interfere with anyone’s enjoyment or use of the Site, the EPA has attempted to communicate its intention to conduct the RI/FS to the last-known owners of record, but the efforts to obtain access from the owners have been futile. Molitor Decl. ¶¶14 to 16.

At this Site, EPA has a reasonable basis to believe “there may be a release or threat of release of a hazardous substance or pollutant or contaminant,” within the meaning of Section 104(e)(1) of CERCLA, 42 U.S.C. § 9604(e)(1). This reasonable basis is supported by:

An Expanded Site Inspection (ESI) that was conducted during the week of October 19-22, 2009. See Attachment 1. During the ESI, the IEPA collected four slag/waste samples from the Site and surrounding area. The substances antimony (up to 195 parts per million (“ppm”), arsenic (up to 70 ppm), cadmium (up to 64 ppm), copper (up to 3640 ppm), lead (up to 37,600 ppm), nickel (up to 1770 ppm) and zinc (up to 277,000 ppm) were detected

in the four waste samples, and chromium(up to 157 ppm), mercury(up to 4 ppm) and selenium(up to 16 ppm) were detected in three of the four waste samples at levels that were at least three times higher than background concentrations. The report also noted that an earlier sampling event in 1997 found elevated levels of antimony, arsenic, barium, cadmium, chromium, copper, iron, lead, mercury, nickel, selenium, silver, sodium, and zinc from the cinder/slag pile on the Site. These waste products of the smelter operations are hazardous substances within the meaning of Sections 101(14)(B) and 102(a) of CERCLA, 42 U.S.C. §§ 9601(14)(B) and 9602(a), and Section 302.4 of the NCP, 40 C.F.R. § 302.4. These elevated levels of hazardous substances could adversely impact potential receptors such as designated wetlands, environmental and aquatic wildlife and human receptors.

The Hazard Ranking Score package, which was used to determine that the Site should be proposed and listed on the NPL. See Attachment 2. The listing is based on the potential threat to human health and the environment that the Site may present from surface water contaminated with hazardous substances migrating from the Site to the surrounding environment. See Attachment 2.

Observations by the RPM during a Site visit during which she noted the presence of cinder/slag piles of possibly contaminated material located on the Site. See Attachment 5-Molitor Declaration ¶11.

After the EPA makes the required showing of a reasonable basis for believing there may be a release or threat of release of a hazardous substance, pollutant or contaminant, a court may issue a warrant *ex parte* to enforce EPA's statutory right of entry and inspection under the CERCLA. *In re Clean Air Act Administrative Inspection of the Bunker Hill Co. Lead and Zinc Smelter*, 15 ERC

1063 (D. Idaho 1980), *aff'd*, 658 F.2d 1280 (9th Cir. 1981); *In re Alameda County Assessor's Parcel Nos. 537-801-2-4 and 537-850-9*, 672 F. Supp. 1278, 1287 (N.D. Cal. 1987) (in both cases ex parte warrants were issued to EPA to perform inspections under other federal environmental statutes, based on showings of reasonable cause to believe that violations of those statutes had occurred or would occur). Agencies may obtain administrative inspection warrants ex parte even when surprise is not necessary. *In re Bunker Hill Co.*, 15 ERC 1063.

The present case is readily distinguishable from *United States v. Tarkowski*, 248 F.3d 596 (7th Cir. 2001), where the Seventh Circuit affirmed an order denying a request under Section 104(e)(5) of CERCLA, 42 U.S.C. § 9604(e)(5), seeking access to residential property for a mixture of investigative **and** remediation activities, including, potentially, the excavation and removal of any buried drums found on the property, and the removal of various other objects, such as asbestos-containing materials, batteries, drums and containers that Mr. Tarkowski considered valuable assets. Because EPA had not already completed an extensive investigation of Mr. Tarkowski's property prior to commencement of the access proceeding, the government supported the access request with limited available evidence documenting the presence of trace amounts of hazardous substances on Tarkowski's property. Although the Seventh Circuit acknowledged that such evidence satisfied the the statutory requirement to establish a reasonable basis to believe that there may be a release or threat of release of a hazardous substance, the Court focused on whether, under the circumstances before it, the access request was arbitrary and capricious, given the lack of proof of significant contamination on the Tarkowski property. In affirming the district court's denial of the requested access, the Seventh Circuit characterized EPA's warrant application in that case as "judicial carte blanche to conduct drastic remedial action in advance of obtaining any rational basis for believing that there is any danger to the environment that would warrant such action." *Tarkowski*, at 600. The

Court expressly stated that “we need not consider whether, if only the former [access authority for investigative activities] were sought, the EPA has made a sufficient showing to justify such an order, as in *United States v. Fisher*, 864 F. 2d 434, 438 (7th Cir. 1988) – which was, however, a much stronger case for such an order than this one is.” *Id.*, at 590.

In contrast with the situation before the court in *Tarkowski*, this is not a case where EPA is seeking authority to conduct cleanup activities on the Sandoval Zinc Site prior to demonstrating any danger to the environment. The Application for Administrative Warrant in this case explicitly seeks authorization to enter the property to inspect, investigate and perform sampling at the Sandoval Zinc Site – not to conduct cleanup operations. The declaration of Pamela Molitor, EPA’s Remedial Project Manager for the Site, confirms that the purpose of the access request is to allow EPA to conduct a Remedial Investigation/Feasibility Study (“RI/FS”), which is part of the process prescribed in the National Contingency Plan, 40 C.F.R. Part 300, for determining the nature and extent of contamination that may present an unreasonable risk to human health and the environment, and for developing and evaluating potential remedial options. See Attachment 5, Molitor Declaration, ¶¶ 9, 17.² If information collected through the RI/FS leads EPA to conclude that cleanup activities are needed at the Site, The Application for Administrative Warrant, p. 2, and the Molitor Declaration, ¶ 19, make clear that the government will seek a separate access order for such work, in the event EPA cannot obtain consensual access for such cleanup work. See Attachment 5, Molitor Declaration, at ¶ 19. This is the procedure the *Tarkowski* Court explicitly approved. See *Tarkowski*, 248 F.3d at 601-02.

² The description of RI/FS activities in the Molitor Declaration, at ¶¶ 12, 13, are also focused on collection of data needed to evaluate site conditions and determine the need for response action at the Site, rather than on taking action to clean up detected contamination.

Finally, in contrast with the *Tarkowski* case, this is not a case where EPA is relying on limited evidence showing trace amounts of contamination, without any indication that the contaminants may present an environmental danger of any kind. Rather, as noted above, in this case, EPA has documented elevated concentrations of numerous hazardous substances, and an evaluation of the Site under the Hazard Ranking System (“HRS”) established pursuant to Section 105(c) of CERCLA, 42 U.S.C. § 9605(c), resulted in a HRS score sufficient to cause the Site to be listed on the National Priorities List. The Expanded Site Inspection and the HRS Scoring Package document the presence of hazardous substances at levels that could present a risk to human health and the environment. Also, the Remedial Project Manager’s review of site records and observations of the Site support the belief that there is and will continue to be the release of hazardous substances at the Site. Molitor Declaration ¶11. This information adequately supports the present request for access to the Site for purposes of conducting a comprehensive RI/FS evaluation of the Site as contemplated in the National Contingency Plan.

IV. Conclusion

For the reasons set forth above, the EPA requests that this Court issue an administrative warrant allowing EPA’s authorized representatives, as well as authorized representatives of the IEPA, to enter, inspect, investigation, photograph, collect samples from, and take all actions necessary to perform a CERCLA remedial investigation and feasibility study at the Site in accordance with section 104(e) of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9604(e). A copy of this Warrant shall be left at the premises at the time of the

inspection and EPA will post a notice at the Site providing a name and number for any owner of the property to contact if he/she has any questions or concerns.

Respectfully submitted,

STEPHEN R. WIGGINTON
United States Attorney

/s/ **James M. Hipkiss**
JAMES M. HIPKISS
Assistant United State Attorney
9 Executive Drive
Fairview Heights, IL 62208
Phone: 618-628-3700
Fax: 618-622-3810
E-mail: Jim.Hipkiss@usdoj.gov
[EFILE EES.ENRD@usdoj.gov](mailto:EFILE_EES.ENRD@usdoj.gov)

ATTACHMENTS

1. Expanded Site Inspection- April 5, 2010
2. HRS Scoring Package
3. March 10, 2011 Federal Register Notice
4. September 16, 2011 Federal Register Notice
5. Declaration of Pamela Molitor
6. September 20, 2011 letters
7. Returned September 20, 2011 letters
8. October 27, 2011 letters
9. Returned October 27, 2011 letters
10. Green card for October 27, 2011 letter